retransmission consent rights of all of its O&Os and to elect must-carry on all Cablevision systems.[610]

214. JCC also urges us to prohibit News Corp. from entering into any exclusive retransmission consent contracts or other exclusive distribution agreements for its O&Os and any other broadcast stations on which it negotiates agreements, make its broadcast stations available to all MVPDs on a non-discriminatory basis, and to require News Corp. to enter into arbitration proceedings to negotiate carriage of its broadcast stations in certain circumstances.[611] As described in Section VI.C.4.b *supra*, JCC propose that we institute a commercial arbitration remedy for aggrieved MVPDs to use when retransmission consent negotiations reach an impasse.[612] The arbitration mechanism, according to JCC, is designed constrain the undue pricing power and bargaining leverage News Corp. gains by its ability to profit from subscriber shifts to DirecTV during periods of temporary foreclosure, and thereby mitigate News Corp.'s ability to utilize DirecTV as a "tactical weapon" during retransmission consent negotiations with unaffiliated MVPDs.[613] JCC also recommends that we prohibit News Corp. from removing its broadcast station signal from the aggrieved MVPD's system during the pendency of an arbitration proceeding. RCN supports this aspect of JCC's proposal.[614] JCC also urge us to mandate that News Corp. grant MVPDs nondiscriminatory access to any nationwide high-definition ("HDTV") feed of Fox network programming that News Corp. may implement in the future.[615] EchoStar urges us to: (i) apply the good faith negotiation rules proposed by DirecTV in the good faith negotiation proceeding to News Corp.;[616] and (ii) require that retransmission consent fees for Fox O&Os do not exceed the lower of: the highest fees agreed to with any other network station in the same market *or* the fees agreed to for Fox affiliates in other markets.[617]

215. *Discussion.* Several conditions proposed by commenters are intended to remedy situations that are unrelated to the transaction. As we stated earlier, we decline to impose non-transaction specific conditions. The goal of our transfer application review process is to allow parties to realize the economic efficiencies associated with a transaction while ensuring that any harms resulting from the license transfer are mitigated and some portion of the benefits of the transfer are passed on to the public. For example, the ACA and Cablevision request that DirecTV be required to make its local-into-local broadcast station signals available to cable operators when the cable operator cannot receive a good quality broadcast signal off-air.[618] We do not have any evidence that the transaction will reduce the

[610] Cablevision Comments at 27.

[611] JCC Aug. 18 Ex Parte., Attachment at 7-8

[612] JCC Aug. 18 Ex Parte, Attachment at 7-8.

[613] JCC Aug. 18 Ex Parte at 2.

[614] RCN Oct. 24 Ex Parte, Attachment at 7.

[615] JCC Comments at 65-66.

[616] *See Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, CS Docket No. 99-363, DirecTV Comments (filed Jan. 12, 2000). *See also Good Faith Negotiation Order.*

[617] EchoStar Petition at 67; *see also* JCC Reply Comments at 15-16.

[618] ACA Oct. 17 Ex Parte at 11-12.

quality of broadcast signals available to cable operators and we therefore decline the condition as being unrelated to the transaction.

216. We also reject the proposed conditions that are calculated to remedy harms that we have determined are unlikely to occur. EchoStar worries that the sharing of information about requests for retransmission request between News Corp.'s owned and operated television stations and DirecTV will allow DirecTV to engage in strategic actions that will reduce EchoStar's incentives to introduce local-into-local service in additional markets.[619] We find this harm unlikely to occur. Evidence in the record indicates that **[REDACTED]**.[620]

217. Many of the proposed conditions attempt to remedy the harms we have identified, but in our opinion either fail to remedy the harms or place the Applicants at a disadvantage relative to their positions prior to the transaction. For example, Cablevisions' proposal to require the waiver of retransmission consent for News Corp.'s owned and operated stations only in areas served by Cablevision fails to fully address the harms. Our analysis demonstrates that consumers in nearly all areas of the country are likely to be harmed by the transaction. In addition, applying Cablevision's condition to all of News Corp.'s owned and operated stations would put News Corp. at a distinct disadvantage in obtaining carriage of its cable networks relative to other broadcast station owners with affiliated cable programming networks such as Viacom and Disney.

218. *Conditions.* We impose several conditions on News Corp that combine the most attractive aspects of several proposals in the record. At the outset, in terms of stations covered by our remedy, we realize that today News Corp. does not negotiate retransmission consent agreements on behalf of independently owned network affiliates.[621] However, our analysis indicates that the harms we believe will occur in markets served by News Corp.'s owned and operated stations could also occur in markets served by broadcast stations affiliated with the Fox network. Since these stations do not possess an ownership interest in DirecTV, we are not concerned about a substantial change in leverage in retransmission consent negotiations except in situations where News Corp. is able to intervene in the negotiations. Accordingly, we extend our conditions to apply whenever News Corp. negotiates retransmission consent agreements on behalf of independently owned Fox network affiliates.

219. We will extend the commitments News Corp. has proposed regarding non-discriminatory access to cable programming networks to encompass access to any broadcast station that News Corp. owns and operates, or on whose behalf it negotiates retransmission consent. This will, as Consumers Union has noted, prevent News Corp. from engaging in competitive abuses such as selling Fox broadcast programming to DirecTV's competitors at prices that are substantially and unjustifiably higher than the price paid by DirecTV. Congress prohibited non-discrimination for satellite programming to ensure this programming was available to competing MVPDs. We believe that a similar prohibition toward News Corp.'s broadcast stations will counter its market power and make certain that this critical programming is available to MVPDs. In addition, the good faith and exclusivity requirements of SHVIA, which, by their terms, are effective only until January 1, 2006, are extended to apply to News Corp. for as long as our program access rules are in effect. This should help to temper increases in News Corp.'s market

[619] EchoStar Petition at 17-18.

[620] **[REDACTED]**.

[621] Applicants' Response to Third Information and Document Request at 1-3.

power arising from the transaction and protect the public interest in continued access to local broadcast stations carried by their MVPD as part of their package of video programming services.

220. Our primary condition to alleviate the public interest harms in the market for broadcast station retransmission consent is to allow MVPDs with 5,000 or more subscribers to elect to submit a dispute with News Corp. over the terms and conditions of carriage of programming subject to retransmission consent to commercial arbitration. We choose this remedy to provide a fair and neutral mechanism by which disputants can quickly resolve retransmission consent disputes. The arbitration mechanism is intended to limit News Corp.'s post-transaction incentive and ability to threaten or impose broadcast service interruptions on subscribers of competing MVPDs to extract greater price increases than it obtain under today's conditions.

221. Upon receiving notice of the intention to submit the dispute to arbitration, pursuant to the procedures described in the following paragraph, News Corp. must immediately allow continued retransmission of the broadcast station signal under the same terms and conditions of the expired contract, unless the dispute is a first time request for local broadcast station signal carriage by an MVPD. The staff analysis clearly demonstrates that, even in the absence of the supracompetitive rates, News Corp.'s threats of temporary foreclosure can generate significant gains in nearly all markets. Consumer reactions in this area are such that the additional profits DirecTV would earn from subscribers switching MVPDs will likely compensate News Corp. relatively rapidly for the lost revenue from reduced distribution of the broadcast signal.

222. We establish the following procedures for arbitration of retransmission consent disputes:

Commercial Arbitration Remedy

- The commercial arbitration condition commences following the expiration of any existing retransmission consent agreement.
- Following such expiration, or 90 days after a first time request for retransmission consent, an MVPD may notify News Corp. within five business days that it intends to request arbitration over the terms and conditions of retransmission consent.
- Upon receiving timely notice of the MVPD's intent to arbitrate, News Corp. must immediately allow continued retransmission of the broadcast signal under the same terms and conditions of the expired retransmission consent agreement as long as the MVPD continues to meet the obligations set forth in this condition.
- Retransmission of the broadcast signal during the period of arbitration is not required in the case of first time requests for carriage.
- *"Cooling Off Period."* Following the MVPD's notice of intent to submit the dispute to arbitration, but prior to filing for formal arbitration with the American Arbitration Association ("AAA"), the MVPD and News Corp. will enter a "cooling off" period during which negotiations will continue.
- *Formal Filing with the AAA*. The MVPD's formal demand for arbitration, which shall include the MVPD's "final offer," may be filed with the AAA no earlier than the fifteenth business day after the expiration of the retransmission consent agreement and no later than the end of the twentieth business day following such expiration. If the MVPD makes a timely demand, News Corp. must participate in the arbitration proceeding.
- The AAA will notify News Corp. and the MVPD upon receiving the MVPD's formal filing.
- News Corp. will file a "final offer" with the AAA within two business days of being notified by the AAA that a formal demand for arbitration has been filed by the MVPD.

- The MVPD's final offer may not be disclosed until the AAA has received the final offer from News Corp.
- The final offers shall be in the form of a contract for the retransmission of the broadcast signal for a period of three years. The final offers may not include any provision to carry any video programming networks or any other service other than the broadcast signal.

Rules of Arbitration

- The arbitration will be decided by a single arbitrator under the expedited procedures of the Rules, excluding the rules relating to large, complex cases, but including the modifications to the Rules set forth in the Order.
- The parties may agree to modify any of the time limits set forth above and any of the procedural rules of the arbitration; absent agreement, however, the rules specified herein apply. The parties may not, however, modify the requirement that they engage in final-offer arbitration.
- The arbitrator is directed to choose the "final offer" of the party which most closely approximates the fair market value of the programming carriage rights at issue.
- To determine fair market value, the arbitrator may consider any relevant evidence (and may require the parties to submit such evidence to the extent it is in their possession),[622] including, but not limited to:
  - current contracts between MVPDs and Fox-affiliated stations on whose behalf News Corp. does not negotiate;
  - current contracts between MVPDs and non-Fox network stations;
  - offers made in the preceding negotiations (which may provide evidence of either a floor or a ceiling of fair market value);
  - evidence of the relative value of Fox programming compared to other network programming (e.g., advertising rates, ratings);
  - contracts between MVPDs and stations on whose behalf News Corp. has negotiated made before News Corp. acquired control of DirecTV as well as offers made in such negotiations;[623]
  - internal studies of the imputed value of retransmission consent agreements in bundled agreements;[624]
  - changes in the value of non-Fox retransmission consent agreements;
  - changes in the value or costs of Fox programming or broadcast stations, or in other prices relevant to the relative value of Fox broadcast programming (e.g., advertising rates).

- The arbitrator may not consider offers prior to the arbitration made by the MVPD and News Corp. for the programming at issue in determining the fair market value.

[622] We clarify that, by "possession," we mean actual possession or control.

[623] **[REDACTED]**.

[624] **[REDACTED]**.

- If the arbitrator finds that one party's conduct, during the course of the arbitration, has been unreasonable, the arbitrator may assess all or a portion of the other parties costs and expenses (including attorney fees) against the offending party.
- Following the decision of the arbitrator, and to the extent practicable, the terms of the new retransmission consent agreement, including payment terms, if any, will become retroactive to the expiration date of the previous retransmission consent agreement. The MVPD will make an additional payment to News Corp. in an amount representing the difference, if any, between the amount that is required to be paid under the arbitrator's award and the amount actually paid under the terms of the expired contract during the period of arbitration.
- Judgment upon an award entered by the arbitrator may be entered by any court having competent jurisdiction over the matter, unless one party indicates that it wishes to seek review of the award with the Commission, and does so in a timely manner.

Review of Award by the Commission

- A party aggrieved by the arbitrator's award may file with the Commission a petition seeking *de novo* review of the award. The petition must be filed within 30 days of the date the award is published.
- The MVPD may elect to continue to retransmit the broadcast signal pending the FCC decision, subject to the terms and conditions of the arbitrator's award.
- In reviewing the award, the Commission will examine the same evidence that was presented to the Arbitrator and will choose the final offer of the party that most closely approximates the fair market value of the programming carriage rights at issue.
- The Commission may award the winning party costs and expenses (including reasonable attorney fees), to be paid by the losing party, if it considers the appeal or conduct by the losing party to have been unreasonable. Such an award of costs and expenses may cover both the appeal and the costs and expenses (including reasonable attorney fees) of the arbitration.[625]

223. An MVPD meeting the Commission's definition of "small cable company" may appoint a bargaining agent to bargain collectively on its behalf in negotiating with News Corp. for carriage of the programming subject to this condition and News Corp. may not refuse to negotiate with such an entity.[626] The designated collective bargaining entity will have all the rights and responsibilities granted by these conditions.

224. The costs of arbitration may overwhelm MVPDs with fewer than 5000 subscribers, thereby providing them with little relief from the harms associated with this transaction. Accordingly, as suggested by ACA, when dealing with MVPDs with fewer than 5,000 total subscribers, we require News Corp. to either elect "must-carry" status or negotiate retransmission consent for its owned and operated stations without any requirements for cash compensation or carriage of programming other than the broadcast signal. While we are unwilling to apply such a condition to all MVPDs since it would seriously disadvantage News Corp. relative to other producers of video programming that also own broadcast stations, we find the adverse consequences on News Corp. to be minimal. In the latest

[625] The Commission has the authority to award attorney fees and costs. *See* 47 C.F.R. § 1.6009(b)(3).

[626] The Commission has previously defined small cable companies as those with 400,000 or fewer subscribers. We adopt that definition for the purposes of this condition. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, 10 FCC Rcd 7393 (1995).

retransmission consent cycle, News Corp. granted retransmission consent to approximately 71% of the cable operators serving markets in which it owns and operates broadcast stations without seeking compensation of any kind.[627]

225. No later than 20 business days prior to the expiration of a must-carry election or retransmission consent agreement with an MVPD, News Corp. must provide the MVPD with a copy of the conditions imposed in this Order. News Corp. must provide a copy of the conditions imposed in this Order within 10 business days of receiving a first time request for retransmission consent.

226. As we observed above, the markets and technologies used in the provision of MVPD services and video programming continue to evolve over time, rendering accurate predictions of future competitive conditions difficult. Accordingly, the conditions concerning carriage of programming subject to retransmission consent shall cease to be effective six years after the release of this *Order*.[628] The Commission will consider a petition for modification of this condition if it can be demonstrated that there has been a material change in circumstance or the conditions have proven unduly burdensome, rendering the condition no longer necessary in the public interest.

d. Access to Programming-Related Technologies

(i) Electronic Program Guides/Interactive Program Guides

227. *Background.* In this section we examine the proposed transaction's potential impact on the use of electronic program guides ("EPGs") and interactive program guides ("IPGs"). An EPG is a software-based service or device offered by cable operators and other MVPDs to consumers to navigate, organize, and differentiate video program offerings.[629] An IPG is an EPG that allows for consumer interactivity. For example, a consumer with an IPG is able to sort and select programming, schedule reminders for upcoming programming, obtain additional information or descriptions about the programming or advertised products, as well as purchase pay-per-view and video-on-demand programming using their remote control.[630]

228. News Corp. holds a 42.9% interest in Gemstar – TV Guide International, Inc. ("Gemstar"), the leading provider of EPGs and IPGs.[631] Gemstar currently offers three guide products to MVPDs: TV Guide Channel (an EPG), EPG, Jr. (a text-only guide), and TV Guide Interactive (an IPG).[632] News Corp. also states that its subsidiary, NDS, has entered into a patent agreement with

[627] Applicants' Reply at 46.

[628] The six-year period is intended to cover the next two retransmission consent negotiation cycles.

[629] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 17 FCC Rcd 26901 (2002).

[630] The majority of the comments focused on EPGs.

[631] Application at 65.

[632] Gemstar July 31 Response at 7.

Gemstar and begun to offer an IPG in the United States, although the IPG is not yet operational.[633] The NDS IPG is offered only in conjunction with NDS conditional access technology and not on a stand-alone basis.[634]

229. *Positions of the Parties.* Several parties contend that the proposed transaction will increase News Corp.'s incentive to tie Gemstar's EPG to retransmission consent negotiations with unaffiliated MVPDs and that News Corp.'s enhanced bargaining power could force these other MVPDs to use the Gemstar EPG to the exclusion of alternative, preferred products.[635] Cablevision contends that News Corp. could use its increased leverage in retransmission consent negotiations with Cablevision and Rainbow DBS to force them to carry the Gemstar EPG.[636] Cablevision also contends that News Corp., through DirecTV, is guaranteed access to an MVPD platform even if cable operators do not agree to use the Gemstar EPG as a condition for access to the Fox O&O broadcast stations.[637] JCC argue that News Corp., in a carriage dispute, could use the EPG "to exploit subscriber dislocation and resentment associated with dropped channels, through heightened promotion of DirecTV or by placing text messages and click-through DirecTV marketing materials on the EPG channel slot normally associated with the dropped service."[638] JCC note the DOJ's position that EPGs/IPGs are a relevant antitrust product market and contend that EPGs are a necessary component of cable operator product offerings.[639] They claim that cable operators that have committed to upgrade their systems would not regard incompatible EPGs as viable substitutes and are thus "locked in" to agreements with Gemstar.[640] JCC and ACA claim that News Corp. could use its control of Gemstar to disadvantage DirecTV's rivals by raising the costs of the Gemstar EPG or otherwise discriminating against cable operators, including small cable operators, in the content, unique features, or license terms and conditions offered to these competitors.[641] The JCC argue that the proposed transaction "threatens to give new impetus to anti-competitive leveraging of Gemstar/TV Guide's dominance in the EPG marketplace."[642]

230. News Corp. contends that any competitive concerns regarding its 42.9% control of

[633] News Corp. July 28 Response at 27-29. According to News Corp., "[t]o date, NDS has entered into agreements to provide its IPG product to only two MVPDs: (1) a single RCN system in the Chicago area; and (2) the DBS system planned by a Cablevision subsidiary, R/L DBS." *Id.* at 27.

[634] *Id.* at 27. News Corp. also states that NDS has "received no revenue in exchange for distribution of its IPG product" and that the IPG will not carry advertising. *Id.* at 28.

[635] Cablevision Comments at 20-22; CDD Petition at 3-4; EchoStar Petition at 24-25; JCC Comments at 48-49; NAB Comments at 20; NRTC Petition at 14-15; ACA Reply at 9; JCC Reply at 8-9.

[636] Cablevision Comments at 21.

[637] Cablevision Comments at 3.

[638] JCC Comments at 48.

[639] *Id.* at 49 n.120 (citing *U.S. v. Gemstar and TV Guide*, CV No. 1:03CV00198, (D.D.C., filed Feb. 6, 2003)).

[640] *Id.* at 49.

[641] JCC Comments at 49; ACA Reply at 9.

[642] JCC Aug. 4 Ex Parte at 14-15.

Gemstar are unwarranted because DirecTV has only a small share of the MVPD market and that, "in practice, Gemstar has not been the default EPG for the DTH systems in which News Corp. holds an interest – for example, BSkyB uses a different EPG product."[643] News Corp.'s argument is premised on the Commission's decision regarding the lack of potential harm from an EPG/MVPD affiliation in the *AT&T-MediaOne* transaction, where AT&T's acquisition of Media One was found to pose no threat to competition in the EPG marketplace.[644] In *AT&T-MediaOne,* the Commission identified three potential harms from an EPG/MVPD affiliation: (1) the MVPD could steer subscribers toward affiliated content providers; (2) the MVPD could harm unaffiliated EPG providers by selecting affiliated EPGs for its system; and (3) the MVPD could lock EPG providers into exclusive contracts that would prevent them from dealing with other MVPDs.[645] The Commission found that the requirement that AT&T reduce its attributable cable system ownership interests was sufficient to circumscribe AT&T's alleged ability to harm unaffiliated content providers, unaffiliated EPGs, and other MVPDs because AT&T, post-divestiture, would serve a smaller share of the MVPD market.[646] Although AT&T held a comparable interest to News Corp. in TV Guide (a corporate predecessor of Gemstar), News Corp. argues that there is no basis for concern here because DirecTV has a much smaller share of the MVPD market than that allowed in the *AT&T-MediaOne* transaction.[647]

231. NRTC, however, contends that the potential for vertical foreclosure and discrimination in favor of News Corp.'s EPG is greater here than in the case of *AT&T-MediaOne* because cable was subject to a 30% ownership (coverage) cap while full-CONUS DBS operators such as DirecTV have 100% nationwide coverage and no market share cap.[648] In addition, CDD argues that given Gemstar's penetration to approximately 100 million people in the United States, the importance in controlling the EPG cannot be understated and it urges the Commission to examine all the proprietary technologies and intellectual property relationships involving Gemstar to determine the impact that this News Corp.-controlled entity will have on a wide number of markets, including consumer electronics, VCR-plus, and set-top boxes.[649] According to Cablevision and EchoStar, Gemstar has aggressively asserted its patent rights in litigation against competing EPG providers and users of EPGs, taking a broad view that its patents encompass the use of EPGs, including the interactive grid guide.[650] EchoStar argues that Gemstar, should it prevail on its patent claims, would exert monopoly power over all EPG providers, including EchoStar.[651] EchoStar also argues that News Corp., with an assured distribution outlet in

[643] Application at 66-67.

[644] *Id.* at 65-67 (citing *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Grop, Inc., Transferor, to AT&T Corp., Transferee,* 15 FCC Rcd 9816, 9856-58 (2000) ("*AT&T-MediaOne*")).

[645] *AT&T-MediaOne*, 15 FCC Rcd at 9857 ¶ 89.

[646] *AT&T-MediaOne*, 15 FCC Rcd at 9857-58 ¶ 90.

[647] Application at 66. *See also* Applicants' Nov. 14 Ex Parte at 2.

[648] NRTC Petition at 14-15.

[649] CDD Petition at 3-4.

[650] Cablevision Comments at 21; EchoStar Petition at 24.

[651] EchoStar Petition at 25. On June 19, 2003, the U.S. District Court in Atlanta granted EchoStar's motion for summary judgment against Gemstar concerning issues involving a patent for electronic program guide technology. (continued....)

DirecTV, would be unfettered to extract unreasonable fees or other terms and conditions relating to its programming assets by leveraging its market power in the EPG realm.[652] EchoStar and the JCC request that the Commission clarify that program access rules would extend to EPGs and "[p]rohibit the tying of any non-programming intellectual property rights to the carriage of programming."[653]

232. CDD also states that Fox stations have been given a preferred position on the IPG in their designated market areas and that Gemstar has the right to transmit IPG data in the vertical blanking interval of each Fox O&O broadcast station.[654] CDD also contends that Gemstar's licensing arrangements with MSOs under which it shares a portion of the interactive platform advertising revenue that it generates through the MSO raises questions about the integration of News Corp. business operations with the cable industry, its primary competitor.[655]

233. In response, News Corp. points out that the Commission concluded in *AT&T-MediaOne* that concerns relating to the EPG marketplace are more appropriately addressed in a general, industry wide, rulemaking and thus the Commission has made clear that an individual transfer application would not be the proper forum in which to address EPG-specific issues.[656] News Corp. claims that the Commission's decision in *AT&T-MediaOne* established the general proposition that an MVPD with less than 30% of MVPD subscribers would not have the ability to use a commonly-owned EPG to disadvantage other MVPDs, other programmers, or other EPG providers and thus the transaction will have no such adverse consequences.[657] News Corp. finds that virtually all of the concerns raised by the parties are irrelevant to this proceeding because they are wholly speculative and in no way arise from the instant transaction.[658] News Corp. argues that its interest in the EPG technology platform already exists, and is not altered in any way by the proposed transaction, and it states that it could attempt to use retransmission consent rights today to promote the use of the Gemstar EPG over cable and satellite MVPDs, if such a strategy made economic sense.[659]

234. *Discussion.* We find that many of the harms alleged are unrelated to this transaction. The alleged harms arising from joint control of video programming assets and program guides can occur regardless of this transaction. Under our general rulemaking authority, we have committed to "monitor

(Continued from previous page)
EchoStar filed suit against Gemstar in December 2000, accusing the company of violating federal and state antitrust laws. Gemstar counterclaimed, accusing EchoStar of infringing on two patents. Gemstar is expected to reinstate it patent claims and seek a new court decision sometime in 2004. *See* SkyReport, Jun. 20, 2003, *DISH Wins Patent Case Vs. Gemstar*, at http://www.skyreport.com/viewskyreport.cfm?ReleaseID=1148.

652 EchoStar Petition at 25.

653 EchoStar Petition at 61, 65-66; JCC Reply at 8-9.

654 CDD Petition at 4.

655 *Id.*

656 *Id.* at 50-51.

657 *Id.* at 52.

658 *Id.* at 51.

659 *Id.*

developments with respect to the availability of electronic programming guides to determine whether any action is appropriate in the future."[660] To the extent that evidence accrues that demonstrates the necessity of Commission action regarding the availability of EPGs, we will consider it at that time.[661]

235. An alleged harm that is specific to this transaction involves News Corp.'s purported ability to disadvantage its MVPD rivals through either permanent or temporary foreclosure of electronic and interactive program guides during contract negotiations and using threats of these actions to extract additional concessions. We analyze, in turn, the likelihood of News Corp. engaging in such a strategy for each of the three program guide products sold by its subsidiary, Gemstar-TV Guide: the TV Guide Channel, EPG Jr., and TV Guide Interactive.

236. The program guide feature of the TV Guide Channel consists of a scrolling list of programming organized by the channels carried by the cable system. The TV Guide Channel is available to approximately 50 million MVPD subscribers. We find that while this product possesses a large market share, News Corp. will be unable to use its acquisition of control of DirecTV to extend its dominance in the EPG market because of the relative ease by which competing video programming producers could enter the market or MVPDs could choose to self-supply. In addition, the substitutes available to both consumers and MVPDs should limit the shift of subscribers from rival MVPDs to DirecTV should News Corp. attempt to engage in foreclosure. We do not find high barriers to entry to this market given the common technology used to implement an on-screen display of programming information as well as the existence of an independent supplier of consolidated program listings data.[662] This should eliminate any increased incentives arising from the transaction for News Corp. to engage in permanent foreclosure. In the event of attempted temporary foreclosure, the substitutes available to consumers, which include newspapers, magazines, and the Internet, are more than adequate to carry them through any temporary withdrawal of the EPG and therefore limit the numbers that might switch to DirecTV.

237. With respect to the EPG Jr. product, a text-only program guide, we find that News Corp. does not possess the necessary market power to engage in the harms alleged by the opponents to this transaction. **[REDACTED]**.[663]

238. The TV Guide Interactive product is an on-screen listing of television program information with interactive functions that enable viewers to navigate, sort, select and schedule television

---

[660] *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, 13 FCC Rcd 14775, 14820 ¶ 116 (1998). We are also exploring EPG-related issues in other pending rulemaking proceedings. *See Compatibility Between Cable Systems and Consumer Electronics Equipment*, 15 FCC Rcd 17568 (2000); *Nondiscrimination in the Distribution of Interactive Television Services Over Cable*, 16 FCC Rcd 1321 (2001); *Carriage of Digital Television Broadcast Signals*, 16 FCC Rcd 2598 (2001).

[661] We have also sought comment on the development and deployment of EPGs and the technologies used to provide them to consumers. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 18 FCC Rcd 16042, 16049 (2003).

[662] Tribune Media Services provides listings of program information to competing EPG/IPGs, as well as newspapers, magazines, and other media. In addition, we note that since the original information on programming is supplied by programmers themselves, an MVPD could collect this data on its own.

[663] **[REDACTED]**.

programming for viewing using a remote control.[664] Post-transaction, News Corp. will acquire an interest in the DirecTV-produced IPG. Under some situations, this might raise concerns that the acquisition will enhance News Corp.-controlled Gemstar's ability to affect the price of IPGs. However, DirecTV is not currently selling its IPG to other MVPDs.[665] Although the transaction will result in an increase in concentration in the IPG market, because DirecTV, like the other large MSOs, does not resell its IPG product, it is doubtful that this structural change will cause a change in the behavior of market participants. We therefore do not find that control of DirecTV's IPG product would enhance News Corp.'s ability to restrict the supply of IPGs and thereby influence price.

239. Our concern regarding potential vertical harms attributable to the share of the IPG market controlled by News Corp. is mitigated by several factors. First, we note that **[REDACTED]**.[666] **[REDACTED]**. We also note that the current competitors in the market, as well as the most likely entrants, are firms that manufacture set-top boxes.[667] These are firms with existing relationships with MVPDs and provide one of the necessary inputs -- set-top boxes -- that are required in order for the subscriber to use an IPG. Attempts by News Corp. to raise prices for TV Guide Interactive are likely to be countered by MVPDs switching to alternative suppliers with whom they have existing relationships. **[REDACTED]**.[668] Thus, we do not find that the proposed transaction will likely produce consumer or competitive harms related to access to interactive program guides.

240. Our conditions for RSN and retransmission consent negotiations should alleviate the concerns raised by the commenters regarding News Corp.'s ability to use a tying strategy to leverage RSNs or retransmission consent rights to increase the use or price of the Gemstar EPG.[669] As we indicated above, given the nature of the IPG market, at present any such benefit from tying must come from News Corp's market power as a source of other "essential programming." Because the conditions we impose are intended to neutralize any additional market power created by the proposed transaction in these areas, News Corp. should not be able to successfully tie the purchase of the Gemstar products to its RSN or local broadcast programming in order to garner more market power in the EPG/IPG markets than Gemstar currently holds, as a result of the proposed transaction.

241. Some parties have alleged that News Corp., through patent litigation initiated by Gemstar-TV Guide, has the opportunity to monopolize the IPG market. This in and of itself is not a merger specific issue. Moreover we observe that such claims are already an area of substantial litigation. **[REDACTED]**[670] -- we find that this issue does not warrant specific attention in this license transfer

[664] *See* Gemstar-TV Guide, TV Guide Interactive, at http://www.gemstartvguide.com/whatwedo/ipgproducts.asp (visited Nov. 6, 2003).

[665] In addition, **[REDACTED]**.

[666] **[REDACTED]**.

[667] Pioneer and Scientific Atlanta accounted for nearly 43% of digital set-top boxes shipped in 2001 according to *Kagan Media Trends 2003.*

[668] **[REDACTED]**.

[669] *See* Section VI.C.4.b and c, *supra*, and Section IX, *infra*.

[670] **[REDACTED]**

review proceeding. The Commission will, however, continue to monitor the situation.

(ii) Interactive Television

242. *Background.* The Commission has yet to define interactive television ("ITV") or classify ITV for regulatory purposes under the Communications Act, but has broadly characterized ITV as a service or suite of services that support subscriber-initiated choices or actions that are related to one or more video programming streams.[671] Services providing such capabilities may include video-on-demand, personal video recorder, gaming, e-mail, TV-based e-commerce ("t-commerce"), interactive advertising, interactive program guides, Internet access, and program-related enhanced content.[672] Although not requiring a return path, service offerings such as electronic program guides, might also fit within the ITV category. A number of companies are involved in developing the technical standards, equipment and software necessary to provide ITV services.[673] In connection with its review of the American Online ("AOL") – Time Warner merger, the Commission issued a Notice of Inquiry to consider whether industry-wide rules were needed to address any impediments to the development of ITV services and markets, particularly with respect to cable-delivered ITV services.[674] In *AOL-Time Warner*, the Commission concluded that the newly formed company had the incentive and potential ability to use its combined control of cable system facilities, video programming, and the AOLTV interactive service, to discriminate against unaffiliated video programming networks in the provision of ITV services.[675] The Commission held, however, that the terms of the Federal Trade Commission's AOL-Time Warner Consent Agreement regarding ITV would substantially address concerns about the availability of

---

[671] *See Nondiscrimination in the Distribution of Interactive Television Services Over Cable*, 16 FCC Rcd 1321, 1323 (2001) ("*ITV NOI*"). In the *ITV NOI*, the Commission noted that ITV was rapidly developing, thus making it difficult to define with specificity the precise universe of services that might be encompassed within the term. For purposes of discussion, the *ITV NOI* instead attempted to identify the major technical resources or "building blocks" necessary for the provision of what it understood to be likely ITV services. *Id.*, 16 FCC Rcd at 1329. The identified components were: (1) a video transmission capacity associated with interactive content (*e.g.*, the digital video stream), (2) a two-way connection (*e.g.*, via the Internet), and (3) specialized customer premises equipment (*e.g.*, the interactive television set-top box). *Id.*, 16 FCC Rcd at 1324-25.

[672] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 17 FCC Rcd 26901, 26971 (2002) ("*2002 Video Competition Report*").

[673] Major ITV middleware and content providers include Liberty's OpenTV, ACTV, and Wink; Liberate, Worldgate; and GoldPocket Interactive. *See 2002 Video Competition Report*, 17 FCC Rcd at 26972. News Corp.-controlled NDS recently announced its acquisition of Thomson's *MEDIA*HIGHWAY, another ITV middleware provider. *See NDS Acquires Thomson's MEDIAHIGHWAY and Enters into Strategic Alliance with Thomson on Provision of Middleware* (press release), Sept. 13, 2003. NDS has also entered into an agreement with itaas, Inc. to provide "support services to NDS for the development of interactive applications for Scientific-Atlanta's Explorer set-top boxes." *See NDS Selects itaas Program to Support Development of Advanced Interactive TV Applications,* (press release), July 28, 2003.

[674] *See ITV NOI.*

[675] *See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorization by Time Warner, Inc. and America Online, Inc. to AOL Time Warner, Inc.*, 16 FCC Rcd 6547 (2001) ("*AOL-Time Warner*").

alternatives for the distribution of unaffiliated video programming networks' ITV services.[676] Although the Commission concluded that no further merger-related restrictions pertaining to ITV were warranted, it did find that open questions regarding distribution of ITV services warranted further examination in the aforementioned proceeding of general-applicability. The *ITV NOI* remains pending.

243. *Positions of the Parties.* NAB and CDD argue that the proposed transaction would result in a single entity with control over both content and distribution and therefore allow News Corp. to act as a "gatekeeper" with the ability and the incentive to discriminate against unaffiliated providers of content and services, including providers of ITV and other emerging communications services.[677] NAB contends that discrimination could take "many forms" such as the denial of access to the DBS platform or in "such technology related areas as interactivity, channel assignment and positioning, use of navigation devices and electronic program guides, data transfer speed, and downstream and return path traffic."[678] CDD argues that the relationship between News Corp. and Liberty Media, which controls Open TV and Wink, and has a stake in ACTV and significant cable programming interests, will impact the emerging ITV marketplace by disadvantaging competing program suppliers and technology companies.[679]

244. In response, the Applicants argue that they do not have sufficient market power in any relevant product or geographic market to profitably engage in anti-competitive foreclosure.[680] They further contend that the harms proffered by the parties are speculative and are not transaction-specific and therefore do not provide a basis either for denying their Application or for imposing regulatory conditions.[681] The Applicants also state that News Corp. has no ownership interest in and no agreements pending to acquire an interest in Liberty Media.[682] The Applicants further state that "DirecTV will not enter into exclusive arrangements for satellite cable programming with 'affiliated program rights holders' including Liberty, and will not 'unduly or improperly influence the decision' of such rights holders to

[676] *Id.* at 6646. The FTC ordered AOL-Time Warner not to discriminate in the transmission and carriage of interactive content and forbade AOL-Time Warner from blocking or otherwise interfering with interactive content transmitted by an unaffiliated ISP. The FTC Consent Agreement also prohibited AOL-Time Warner from blocking subscribers' access to any interactive content that is carried on the AOL-Time Warner facilities and thus enabled subscribers to access such content as part of an ITV service provided by an unaffiliated entity. *Id.*

[677] NAB Comments at 20; CDD Nov. 3 Ex Parte at 1-2.

[678] *Id.*

[679] *See* CDD Petition at 4; CDD Nov. 3 Ex Parte at 1-2; CDD Nov. 17 Ex Parte at 3-4. CDD refers to Liberty's present and potential future investment in News Corp. (citing SEC 10Q filing, 5/14/03). OpenTV provides interactive television technology and content for the cable, satellite and terrestrial broadband industries. *See* OpenTV Homepage at http://www.opentv.com (visited Sept. 11, 2003). Wink is a free interactive television service, distributed through partnership agreements with cable and satellite operators, broadcasters, advertisers, and equipment manufacturers, that provides viewers with the ability to access enhanced programs or advertisements via the remote control while continuing to watch television. *See* Wink Homepage at http://www.wink.com (visited Sept. 11, 2003). On July 1, 2003, ACTV was acquired by OpenTV. *See OpenTV Completes the Acquisition of ACTV* (press release), Jul. 1, 2003.

[680] Applicants' Reply at 12-23.

[681] *Id.* at 50-51.

[682] News Corp. July 28 Response at 25.

sell satellite cable programming to other MVPDs, or the prices, terms and conditions of such sale."[683]

245. *Discussion.* In other proceedings, the Commission has found that the interactive television market in the U.S. is nascent and "to date commercial two-way interactive service deployments have been very limited."[684] In our *2002 Video Competition Report*, we reported that "[c]able MSOs and DBS operators continue to develop these services as measures to increase subscribership, develop new streams of revenue, and reduce churn."[685] The Report also indicated that the multiple but incompatible platforms in use today have slowed the development of ITV content and applications.[686] Accordingly, we agree with the Applicants that DirecTV's share of the MVPD market is too small to enable the merged entity to exercise market power in any ITV market. Until this market develops further, the vertical harms alleged by NAB and CDD are speculative at best.[687] We therefore find that this transaction would not create any public interest harm in this particular line of business. We will, however, continue to monitor the development of interactive television technologies and services.[688]

246. With respect to CDD's allegation regarding Liberty, we are not convinced that Liberty's unreciprocated financial interest in News Corp. will induce DirecTV to ignore its customers and the profits they generate, and instead provide programming that its customers may not want. Our analyses of the vertical issues in this transaction hinge on the assumption that News Corp. and DirecTV will act to maximize their profits. CDD's allegation assumes that DirecTV will act in a contrary manner, which we find implausible. Liberty Media and News Corp. do not share any members of their Boards of Directors.[689] While it is true that Liberty owns a substantial share of News Corp. stock, this stock carries only limited voting rights that do not include a vote on the nominees for the Board of Directors. A formal mechanism does not exist, beyond arm's length market transactions, by which Liberty Media can influence the programming choices of DirecTV.

(iii) Conditional Access Technology and Set-top Boxes.

247. *Positions of the Parties.* Cablevision, CDD, and EchoStar argue that News Corp.'s control of DirecTV and NDS would give it the incentive and ability to discriminate against MVPD

683 Applicants' Nov. 14 Ex Parte at 4 (citing Application at 61-63).

684 *2002 Video Competition Report,* 17 FCC Rcd at 26972 ¶ 170.

685 *2002 Video Competition Report,* 17 FCC Rcd at 26972.

686 *Id.*

687 We note that NAB raised similar concerns regarding a cable operator's ability to dominate the ITV market in the *ITV NOI* proceeding. As we reported in the *2002 Video Competition Report,* we have seen no evidence of such domination in the current marketplace.

688 The Commission recently issued the *2003 Video Competition Notice* in which we sought comment on the development and deployment of ITV services and the technologies used to provide them. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* 18 FCC Rcd 16042, 16049 (2003) ("*2003 Video Competition Notice*").

689 Application, Attachments - Volume I at C-3 and Liberty Media Corp., *Notice of Annual Meeting of Shareholders,* at http://www.libertymedia.com/investor_relations/pdfs/annualmeeting_2003.pdf (visited Oct. 2, 2003).

competitors in its provisioning of conditional access technology and interactive applications.[690] Sun Microsystems alleges no particular transaction-specific harm but requests that the Commission require or "at a minimum encourage" DirecTV to migrate to Multimedia Home Platform ("MHP") based set-top box standards, which will allow for interoperability with CableLabs' Open Cable Application Platform ("OCAP") and ATSC's Digital Application Software Environment ("DASE").[691] CDD contends that the Application should be denied or at least conditioned on Applicants providing non-discriminatory access to all related distribution technologies and devices, including conditional access and interactive marketing software/processing.[692]

248. The Applicants respond that the harms alleged by the respective commenters are speculative and, therefore, do not provide a basis for either denying their Application or for imposing regulatory conditions.[693] They also argue that Sun's requested condition falls outside the scope of this proceeding because it "would conflict with the Commission's well-established policy against picking winners and losers among competing technologies and its preference to let the market decide such issues."[694]

249. *Discussion.* As the Applicants note, our preference is to allow the market to determine which technologies succeed and which fail. We see no reason on the record before us to presume that the set-top box market will fail to deploy the technologies that best serve consumers, and therefore decline to impose the condition proposed by Sun Microsystems.

250. With respect to conditional access systems, we find that NDS does not possess sufficient market power in the United States to profitably discriminate against competing MVPDs. Set-top box manufacturers Scientific-Atlanta and Motorola are the dominant providers of conditional access systems to domestic MVPDs.[695] Accordingly, any attempt by NDS to disadvantage DirecTV's rivals would almost certainly be unavailing. We do not impose license conditions to mitigate hypothetical harms.

e. **Access to Fixed Satellite Services**

---

[690] Cablevision Comments at 22; CDD Petition at 4; EchoStar Petition at 38, 60; CDD Nov. 3 Ex Parte at 1-2; CDD Nov. 17 Ex Parte at 2.

[691] Sun July 30 Ex Parte at 1-2. MHP is an open standard created in Europe establishing a common framework for content, application, and service delivery over different transmission systems. It is based on DVB-J, which relies on Sun Microsystem's Java Virtual Machine specification. *See DVB-MHP - What is MHP?* at http://www.mhp.org/what_is_mhp/index.html (visited Nov. 18, 2003).

[692] See Letter from Jeffrey Chester, Center for Digital Democracy, to Marlene H. Dortch, Secretary, FCC (Nov. 7, 2003) at 3 ("CDD Nov. 7 Ex Parte").

[693] Applicants' Reply at 50-51; Applicants' Nov. 14 Ex Parte at 2-3.

[694] News Corp. Aug. 28 Ex Parte at 5 (citing *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24014 (1998); *Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd 11331, 11376 (2002)).

[695] *Kagan Media Trends 2003* at 110 and NE Asia Online, *Sony Pushes New Conditional Access Technology*, May 2003 at http://neasia.nikkeibp.com/nea/200305/cojp_244652.html (visited Oct. 2, 2003).

251. *Background.* A portion of the Application before us involves the transfer of control of the licenses of PanAmSat from Hughes to News Corp.[696] PanAmSat is a significant provider of fixed satellite services ("FSS")[697] in the United States and currently is 81% owned by Hughes.[698] Most distribution of video programming to MVPD service providers (and to over-the-air television broadcasters) is carried over FSS. Upon closing of the proposed transaction, News Corp. would be, in addition to its broadcast television and cable network holdings, both an MVPD and an FSS provider.

252. MVPDs typically retransmit programming received from distant points, rather than originate programming at the locale where transmission takes place. To obtain these signals, MVPDs rely primarily on FSS provided over a number of geo-stationary orbit ("GSO") satellites.[699] For national distribution of video programming within the United States, a full CONUS satellite "footprint" is needed.[700] A significant portion of the capacity on FSS satellites in the United States is dedicated to video distribution.[701]

253. There are three major FSS operators licensed by the United States: SES AMERICOM, PanAmSat, and Loral Space.[702] Other providers include New Skies, Anik, and various Latin American satellites partly available for North American use. PanAmSat owns and operates a fleet of 22 satellites that operate in FSS bands, and with that capacity carries video programming for broadcasters and other programmers, as well as Internet backbone support, communications network support and pipelines for telecommunications providers.[703] SES AMERICOM and its subsidiaries provide similar services through a fleet of 18 satellites.[704]

254. Applicants state that News Corp., as one of the world's largest users of satellite video services, will be able to offer valuable customer insight to PanAmSat.[705] And, because PanAmSat

[696] *See* Application, Volume I, A for a list of all satellite space station authorizations controlled by Hughes; *see also* Application, Volume I, B for a chart depicting a simplified ownership structure of GM/Hughes' pre-transaction FCC licenses; *see also* Application, Volume I, D for a chart depicting a simplified ownership structure of Hughes' post-transaction FCC licenses.

[697] FSS is defined as satellite service between fixed, as opposed to mobile, points, and excludes broadcast satellite service such as DBS.

[698] *See* Application, Volume I, B.

[699] Non-geostationary FSS also exist, but because of cost and other considerations, video distribution is carried primarily by GSO satellites operating in the C- and Ku-bands. In the rest of this Order, when we refer to FSS satellites, we mean GSO FSS satellites exclusively.

[700] The footprint of a satellite at a CONUS location will include the 48 contiguous states.

[701] *See* ING Barings' *Satellite Communications Industry*, March 2000 at 149.

[702] *See* SPACE NEWS, Jun. 23, 2003, at 18.

[703] Application at 6.

[704] *See* Comments of SES AMERICOM, Inc., In the Matter of Loral Satellite, Inc. (Debtor in Possession) and Loral SpaceCom Corporation (Debtor-in-Possession), Assignors, and Intelsat North America LLC, Assignee, Applications for Consent to Assignments of Space Station Authorizations, September 15, 2003, at 2.

[705] *See* Application at 44.

derives more than 65% of its revenues from carrying video services, Applicants claim that News Corp's insight "should prove an invaluable tool in devising strategies for developing new markets and new services around the world."[706] Applicants argue, therefore, that the proposed transaction will create synergies throughout Hughes.[707] Further, Applicants argue that PanAmSat's new ownership structure will neither increase FSS concentration, nor raise any prospect of competitive harm in the MVPD marketplace.[708]

255. NRTC, however, argues that once News Corp. acquires an interest in PanAmSat, it could manipulate the prices paid by broadcasters, cable programmers, and others who rely on PanAmSat for video distribution backhaul, thereby raising costs for competitors and ultimately, their customers.[709] Applicants responded by stating that PanAmSat's current market position is essentially the same as it was in October 2002 when the Commission released its *EchoStar-DirecTV HDO* and found that PanAmSat's market position was such that "any anti-competitive schemes were 'unlikely to occur and even more unlikely to succeed.'"[710]

256. *Discussion.* Although Hughes controls a significant share of the FSS capacity through its ownership of the PanAmSat satellites, News Corp. does not operate any FSS satellites. Thus, upon consummation of the proposed transaction, News Corp. would control the identical percentage to that controlled currently by Hughes. It is therefore evident that the proposed transaction does not increase concentration in the FSS capacity. In addition, as we have previously noted,[711] PanAmSat is already under common control with a DBS provider – DirecTV – and the proposed transaction would not change that situation. No opponent or commenter has made a credible showing as to why News Corp.'s ownership of PanAmSat, as compared to Hughes,' would adversely impact competition in the provision of FSS, in the video programming markets, or any other relevant satellite service or market.

257. As we have discussed, there are situations in which it would be profitable for an integrated firm to pursue a vertical foreclosure strategy against downstream rivals that use the firm's goods or services.[712] Thus, it is possible that News Corp, once it has acquired PanAmSat, might have an incentive to use its market power in the provision of FSS capacity (assuming, arguendo, that it would have such power) to competitively harm video programming rivals who use FSS. For instance, News Corp. could degrade the quality of the FSS service provided to rivals, restrict supply, or raise the price of FSS, all in attempt to gain additional share (and earn additional profits) in the video programming market.

[706] *Id.*

[707] *Id.*

[708] *Id.* at 67.

[709] NRTC Petition at 14.

[710] *See* Applicants' Reply at 53 (citing *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20659).

[711] *See EchoStar-DirecTV HDO*, 17 FCC Rcd at 20660.

[712] *See* Section VI.C.1, *supra*.

258. We find that such attempts are unlikely to occur and even more unlikely to succeed. First, with PanAmSat's share of the FSS capacity, it remains doubtful that News Corp. would have sufficient market power to carry out such a scheme. Second, there appears to be sufficient excess capacity in the FSS market so that if News Corp./PanAmSat attempted to raise the rates it charges to its video programming rivals, or degrade the service it provides to them, it likely would lose these customers to other FSS providers. Thus, unilateral restriction of FSS supply would likely be very costly to News Corp. and would likely achieve very little in the marketplace. Market power in an upstream market is a necessary condition for competitive harms to occur in a vertical merger. We find no change in the competitive landscape that would cause us to alter our prior conclusion that PanAmSat possesses limited market power in the provision of FSS capacity. We therefore conclude that News Corp.'s acquisition of PanAmSat will be unlikely to cause competitive harm in the provision of FSS or in the video programming markets.

VII. OTHER POTENTIAL PUBLIC INTEREST HARMS

A. Impact of the Transaction on Diversity

1. Background

259. As stated above, the Commission's public interest review includes an evaluation of the proposed transaction's affect on the quality and diversity of communications services to consumers.[713] Commenters have raised issues concerning the proposed transaction's impact on program and viewpoint diversity. Commenters contend that the transaction will adversely affect both program diversity and viewpoint diversity, either as a direct result of the combination of an MVPD, programmer, and broadcaster, or as a result of competitive harms posed by the transaction. Applicants counter that the transaction presents no potential harms to viewpoint diversity[714] and will increase programming geared to linguistic, ethnic, and cultural minorities.[715] Commenters disagree, claiming that the Applicants have not shown that any transaction-specific benefits relating to diversity will result from the proposed transaction.[716] Below, we analyze the diversity issues raised by commenters. We conclude that potential harms to viewpoint and program diversity will be addressed by the conditions we are imposing on our approval of the Application.

2. Program Diversity

260. *Positions of the Parties.* One of the Commission's goals is to promote program diversity, which refers to the availability of a variety of programming formats such as comedy, drama, and newsmagazines, as well as specific content categories such as health, business, food and content targeted to ethnic or racial groups.[717] EchoStar asserts that the transaction will have anticompetitive effects on the

[713] *See* Section III, *supra*; *see also EchoStar-DirecTV HDO*, 17 FCC Rcd at 20759-85 ¶¶ 37-52 (analyzing the impact of the proposed transaction on viewpoint and program diversity).

[714] Applicants' Reply at 65-67.

[715] Application at 39-43; Applicants' Sept. 11 Ex Parte at 3-4.

[716] ACA Comments at 28; JCC Comments at 72.

[717] *2002 Biennial Review Order*, 18 FCC Rcd at 13631-32 ¶ 36.

market for video programming which also will harm diversity. EchoStar states that the transaction would foreclose what is currently the largest unaffiliated distribution network, and that vertical integration would reduce or eliminate DirecTV's incentives to offer programming that competes with News Corp. offerings.[718] EchoStar contends that harm to competition in the video programming market could result in fewer viable independent programmers, and therefore less diversity.[719] Cablevision asserts that by combining content, broadcasting, and an MVPD platform, the transaction will give News Corp. substantial leverage and market power that will result in fewer programming choices for cable subscribers and reduced local broadcast programming.[720] Cablevision repeats its claim that vertical integration with an MVPD would allow News Corp. to make a credible threat that it will withhold broadcast retransmission consent rights, giving News Corp. leverage to demand carriage of its affiliated cable programming.[721] Cablevision contends that this pressure to carry News Corp. programming would harm program diversity by thwarting cable operators' ability to select the programming that their subscribers consider most desirable, including new or independent programming services.[722] Cablevision asserts that News Corp. would be using the very rights conferred upon broadcasters to promote diversity and localism to contravene those policy goals.[723] Commenters also assert that, after the transaction, News Corp. would have the incentive and ability to deny access to its affiliated cable network programming to competing MVPDs, which would weaken or eliminate these competitors, thereby harming diversity in the distribution of video programming.[724]

261. *Discussion.* Although the Applicants assert that the proposed transaction would not harm program diversity, but would increase program diversity[725] we find that, absent our conditions, the transaction would be likely to reduce program diversity. As we conclude above in our discussion of the video programming market, the transaction will enhance News Corp.'s incentive and ability to engage in temporary foreclosure of access to its RSN and broadcast television station programming in order to raise rival MVPDs' costs for News Corp. programming and/or secure other carriage concessions. Such a strategy of foreclosure would reduce program diversity on a short term basis because consumers lack access to the foreclosed programming. In the long run, the increased costs paid by MVPDs to News Corp. also can reduce program diversity. For example, to obtain RSN or local broadcast station programming from News Corp., an MVPD may accede to News Corp.'s demands to carry its affiliated cable networks, or to pay supracompetitive rates for News Corp. programming. Absent these increased

---

[718] EchoStar Petition at 39-40; *see also* NRTC Petition at 14; CFA Reply Comments at 9-12.

[719] EchoStar Petition at 39-40; *see also* CFA Reply Comments at 9-12 (asserting that "the diversity of program sources has eroded to the point of extinction")

[720] Cablevision Comments at 23-24.

[721] Cablevision Comments at 14-15; *see also* NRTC Petition at 13.

[722] Cablevision Comments at 14-15.

[723] Cablevision Comments at 24.

[724] Cablevision Comments at 28-29; ACA Comments at 3, 7, 16; NRTC Petition at 14; JCC Comments at 54.

[725] Applicants contend that one of the public interest benefits of the transaction will be DirecTV's carriage of more programming targeted at culturally, ethnically, and linguistically diverse audiences. Application at 42. Applicants' contentions relating to this benefit are discussed at Section VIII.B.8.

costs, the MVPD might have elected to carry a new niche network that would have expanded the types of programming available to its subscribers. We find, however, that by constraining News Corp.'s ability to threaten to foreclose programming and thereby raise prices, and by requiring Applicants to submit bids to the arbitrator for RSN and broadcast station programming on an unbundled basis, the conditions we impose herein will protect against the potential harms to program diversity posed by this transaction.

3. Viewpoint Diversity

262. Another of the Commission's goals in the area of media policy is protection of viewpoint diversity. Accordingly, the Commission has restricted ownership of media outlets in certain ways. The Commission's rationale has been that ownership diversity leads to viewpoint diversity, a rationale that has been sustained in court.[726] Our rules do not, however, prohibit cross ownership of DBS and broadcast outlets, nor have they ever prohibited such ownership structures.

263. *Positions of the Parties.* CDD and others contend that the transaction will result in a loss of both local and national perspectives.[727] They assert that if the transaction is approved, News Corp. will have the incentive and ability to competitively disadvantage unaffiliated content providers and to launch new programming networks on its own distribution system, allowing it to dominate what programming is available to consumers.[728] CFA contends that the transaction will result in a degree of concentration and lack of diversity of media voices that is in direct contravention of the public interest.[729]

264. NRTC is concerned that the transaction may adversely affect viewpoint diversity by eliminating a "voice" in all markets where DirecTV offers DBS service and Fox provides over-the-air broadcast service.[730] NRTC states that this potential for harm to viewpoint diversity is greater in smaller markets, which have fewer distinct voices.[731] NRTC asserts that the Commission cannot evaluate the effects of the proposed transaction on viewpoint diversity without first determining how many homes have access to cable, because without this information, it cannot determine how many media outlets will be available post-transaction in various markets.[732]

265. NAB contends that, absent conditions, the proposed transaction will harm local television broadcast stations, endangering the stations' ability to advance the core public interest goals of diversity and localism.[733] NAB asserts that the post-transaction News Corp. will have the incentive and

[726] *See, e.g., F.C.C. v. N.C.C.B.*, 436 U.S. 775 (1978).

[727] CDD Petition at 2. CFA Reply Comments at 4-5; NRTC Petition at 9-15.

[728] CDD Petition at 3; CFA Reply Comments at 4-5.

[729] CFA Reply Comments at 1.

[730] NRTC Petition at 10-11. According to NRTC, the Commission determined that DBS should be considered a voice for purposes of analyzing viewpoint diversity in the *EchoStar-DirecTV HDO*. *Id.* (citing *EchoStar-DirecTV HDO*, 18 FCC Rcd at 20583-85 ¶¶ 49-52).

[731] NRTC Petition at 11.

[732] NRTC Petition at 13.

[733] NAB Ex Parte at 2; NAB Comments at 11, 21-24.

ability to use a national network feed to distribute the programming it currently offers via local television broadcast stations.[734] According to NAB, the ability to "bypass" television broadcast station affiliates would give post-transaction News Corp. enhanced bargaining power in its relationships with its affiliates.[735] NAB contends that the transaction also gives DirecTV the incentive and ability to discriminate against local television broadcast stations not affiliated with the Fox Network, which may take the form of refusal to carry unaffiliated stations, discriminatory channel positioning, or technological discrimination.[736] NAB also is concerned that the sharing of information between Fox Network and DirecTV on the terms of retransmission consent and affiliation agreements could give both entities negotiating leverage over local broadcasters with respect to such agreements.[737] NAB urges us to condition the Application on a prohibition on bypass of local Fox affiliates, a prohibition on discrimination by DirecTV against unaffiliated local television stations, and a ban on information exchange between News Corp. and DirecTV concerning affiliation agreements and retransmission consent agreements.[738] NAB also asserts that the Applicants should be required to expand local-into-local service into all markets by 2006 in order to ensure that the proposed transaction does not slow the rollout of local-into-local service.[739]

266. APTS/PBS urge us to impose conditions on approval of the transaction to promote diversity, including forbidding DirecTV from segregating local broadcast stations on wing satellites,[740] and requiring DirecTV to carry the free, over-the-air non-duplicative digital signals of public television stations where local television stations are being carried pursuant to SHVIA.[741] Maranatha also urges us to condition grant of the Application on a requirement that DirecTV continue to offer local broadcast television signals on a single satellite dish on grounds that the transaction may result in DirecTV using a second dish to favor News Corp. O&Os and discriminate against other broadcasters.[742]

267. Applicants assert that News Corp. would have no incentive to engage in an affiliate bypass strategy, and that such a strategy, even if practical, would be counter to News Corp.'s own interests.[743] Applicants assert that NRTC is seeking a DBS cross-ownership ban and that NRTC's arguments are without merit.[744] In support of this, Applicants note that the Commission has considered

[734] NAB Comments at 15-19.

[735] NAB Comments at 19; *see also* NRTC Petition at 16.

[736] NAB Comments at 20-21.

[737] NAB Comments at 26-27.

[738] NAB Comments at 25-27.

[739] NAB Comments at 27.

[740] APTS/PBS Comments at 6.

[741] APTS/PBS Comments at 9-10.

[742] Maranatha Comments at 1-2; Reply at 4.

[743] Applicants' Reply at 62-64.

[744] Applicants' Reply at 65-66.

and rejected cable-DBS cross ownership restrictions, although such cross ownership presents more obvious competitive issues than does broadcast-DBS cross ownership.[745] They further assert that prohibiting broadcast-DBS cross ownership would be contrary to recent trends in media ownership regulation and the vacation/repeal of the cable-broadcast cross-ownership rule.[746] In light of these actions, as well as DBS' smaller share of the MVPD market, Applicants contend that there is no basis for limiting broadcast-DBS cross ownership.[747] Applicants state that the transaction will have no effect on viewpoint diversity in small markets because Fox does not own any stations in such markets, so there will be no change in the number of voices in these markets.[748] They further state that in large markets where Fox does own broadcast stations, a wealth of other media outlets will ensure viewpoint diversity, so the transaction will have little or no effect.[749]

268. *Discussion.* We do not agree with NAB's assessment of the likelihood that post-transaction News Corp. will harm local stations by engaging in an affiliate bypass strategy and therefore adversely affect localism and diversity. As we explain elsewhere in this *Order,* we find that the transaction only creates a *de minimis* increase in the likelihood that News Corp. will engage in a bypass strategy and we conclude that therefore, there is no need to impose safeguards against such a strategy.[750] With respect to NAB's claim that the transaction will give DirecTV the incentive and ability to discriminate against unaffiliated broadcasters, we explain above that this is an unlikely result of the proposed transaction. Because we find that the transaction will not enhance DirecTV's incentive or ability to discriminate against unaffiliated broadcasters,[751] we conclude that the combination does not pose a risk of harm to localism or diversity on that basis. As we explain elsewhere in this *Order*, the mandatory carriage provisions of the SHVIA and our rules implementing the statute will ensure that broadcasters will have access to the DirecTV platform in all markets where DirecTV offers local-into-local service. Finally, we disagree with NAB that information sharing between DirecTV and Fox will adversely affect broadcasters negotiating agreements with either entity, and we will not impose a condition limiting the Applicants' communications concerning such agreements. As we explain in our discussion of limitations on information sharing in section VI.C.4, *supra*, we find that the confidentiality

[745] Applicants' Reply at 65 (citing *Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd 11331, 11394-95 (2002)).

[746] Applicants' Reply at 65-66 (citing *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002) ("*Fox Television*"), *rehearing granted*, 293 F.3d 537 (D.C. Cir. 2002) (vacating cable-broadcast cross-ownership rule); *1998 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* 18 FCC Rcd 3002 (2003) (repealing cable-broadcast cross-ownership rule)).

[747] Applicants' Reply at 65-66.

[748] Applicants' Reply at 66.

[749] Applicants' Reply at 65-66.

[750] Indeed, it is not clear that a bypass strategy, if successful, would not actually promote viewpoint diversity because, while Fox programming would remain available in the market on DirecTV, the television broadcast stations formerly affiliated with Fox would remain in existence, and the licensees of these stations would remain obligated to offer programming relevant to the needs and interests of their communities—presumably adding a voice to the market. *See* Section VI.C.3, *supra.*

[751] *See id.*

provisions of the retransmission consent and program carriage agreements make such information sharing unlikely. In addition, NAB also has not specified what harms could result from such information sharing even if it could be accomplished.

269. We do not agree with NRTC that News Corp.'s ownership of local television broadcast stations and an MVPD outlet in certain markets will harm viewpoint diversity. NRTC has not demonstrated how common ownership of DirecTV and local broadcast television stations would result in a loss of diversity of viewpoint that would be harmful to the public interest, particularly given the prevalence of the multiple sources of news and informational programming from broadcast, MVPD and print sources, and the fact that DBS is not currently a source of local news or other local content.

270. We also disagree with commenters who contend that the transaction will reduce viewpoint diversity by giving News Corp. the incentive and ability to discriminate against unaffiliated program producers (*i.e.*, those who sell programs to networks). We find that our program carriage rules, combined with Applicants' proposed commitment not to discriminate against unaffiliated programmers, are sufficient to protect against any potential harms.[752]

271. In contrast, we agree with Commenters who contend that the transaction can enhance News Corp.'s incentive and ability to persuade competitors to carry its affiliated programming. Specifically, as we held above, the transaction may enhance News Corp.'s incentive and ability to extract higher compensation from competing MVPDs in exchange for carriage of its most popular programming—RSN and broadcast programming. Such compensation may include monetary compensation, but also carriage of News Corp. affiliated networks. To obtain RSN or broadcast programming from News Corp., an MVPD may accede to News Corp.'s demands to carry its affiliated cable networks, or to pay supracompetitive rates for News Corp. programming. Absent these demands and higher costs, the MVPD might have elected to carry an independent rival network that would have expanded the sources of programming available to its subscribers. However, we find that this potential harm is remedied by the conditions we have imposed with respect to competing MVPD access to such programming.[753]

272. We decline to adopt APTS/PBS's proposal that we require DirecTV to carry the digital signals of public television stations. The public television station digital signal carriage condition does not address a potential harm specific to the proposed transaction. Given that this proposal does not relate to a transaction-specific issue, it is not appropriately considered in this proceeding. The Commission will not consider industry-wide concerns or establish rules or policies of general applicability in this license transfer proceeding.[754] The record contains no evidence that the transaction will give News Corp. an increased incentive or ability to discriminate against public television stations, or any other evidence of a potential harm which would warrant the imposition of requirements different from those to which other MVPDs are subject with regard to digital carriage of public television stations.

[752] *See* Section VI.C.4 and IX, *supra.*

[753] *See id.*

[754] Questions concerning the carriage of the digital signals of television broadcast stations are the subject of a pending rulemaking proceeding. *Carriage of the Transmissions of Digital Television Broadcast Stations*, 13 FCC Rcd 15092 (1998).

273. With regard to APTS/PBS's proposed condition to restrict DirecTV from segregating local broadcast stations to wing satellites, we recognize that the proposed transaction may give DirecTV greater incentive to favor News Corp.'s Fox broadcast network programming and therefore to move other broadcasters onto other satellites. There is not a majority to decide whether this increased incentive results in a merger-specific harm. Nor is there a majority willing to resolve APTS/PBS's request that the Commission clarify its requirements under SHVIA and specifically, that, in providing local-into-local service pursuant to SHVIA, DirecTV could not place some local broadcast stations on wing satellites. The rationale for their decisions is contained in each of the Commissioners' separate statements.

B. Effect on Network-Affiliate Relationships ("Bypass" Issue)

274. *Positions of the Parties.* NAB contends that as a result of the proposed transaction, News Corp. will have a strong incentive and ability to "bypass" local Fox broadcasting affiliates and instead distribute Fox programming via a national feed.[755] NAB asserts that News Corp. would realize immediate benefits from such an action, including immediate cost savings from reduced or eliminated retransmission consent payments and increased advertising revenue[756] that would otherwise have gone to local Fox affiliates.[757] NAB argues that this change will give DirecTV substantially increased leverage over local affiliates, endangering their ability to serve local interests or provide diversity.[758] According to NAB, a bypass strategy would result in short-term harm to Fox affiliates in the form of lost retransmission consent fees, but also long-term harm to the network-affiliate relationship so critical to the American system of broadcasting.[759] To remedy this potential harm, NAB urges us to prohibit DirecTV from transmitting a Fox network feed in any market currently served by a non-Fox-owned local affiliate.[760] Applicants respond that a bypass strategy scenario makes no sense. Applicants contend they gain more from a broadcast affiliation system which reaches nearly 100% of the country than could be gained through a bypass model based on DirecTV's 13% market share.[761]

275. *Discussion.* Contrary to the contentions of NAB, we find that the transaction creates only a *de minimis* increase in the Applicants' ability and incentive to engage in a bypass strategy. Accordingly, we will not condition our approval of the transaction on the bypass prohibition proposed by NAB. NAB's bypass argument is a variation of the argument made by MVPDs that the transaction will give News Corp. the incentive and ability to engage in permanent foreclosure of access to its broadcast signals by competing MVPDs, which we analyzed above. The only difference between the bypass and

[755] NAB Comments at 11, 15; NAB Comments, Exhibit 1, Decl. of J. Gregory Sidak (Jun. 16, 2003) ("Sidak Decl.").

[756] NAB Comments at 11; Sidak Decl. at ¶¶ 14-19.

[757] NAB Comments, Sidak Decl. at ¶¶ 20-23.

[758] NAB Comments at 21-24. Sidak argues that the harm to Fox affiliates will have a ripple effect across the broadcast landscape to other affiliates. For example, Fox affiliates might be then willing to accept inferior terms from other broadcast network, diminishing the bargaining power of other local broadcasters in the same local area in their affiliation negotiations with their respective networks. NAB Comments at 22, Sidak Decl. ¶ 28.

[759] NAB Comments at 21-24.

[760] NAB Comments at 25-28.

[761] Applicants' Reply at 63.

permanent foreclosure strategies is that a bypass strategy would impose even greater revenue losses on News Corp. If it bypasses local affiliates, News Corp. will lose not only the advertising revenue associated with those rival MVPD subscribers that do not receive over-the-air broadcast signals but also the advertising revenue associated with all non-DirecTV subscribers. We do not find that it would be profitable for News Corp. to engage in permanent foreclosure in the previous situation, and we find it even less likely in NAB's proposed scenario. **[REDACTED]**.[762] **[REDACTED]**. In any event, because the proposed transaction would have a *de minimis* impact on News Corp.'s incentive to engage in this behavior, we do not view it as a likely outcome of the transaction.

C. Collusion with Cable MSOs

276. *Positions of the Parties.* EchoStar argues that the proposed transaction will give News Corp. new incentives to coordinate with other vertically integrated distributors (the large cable MSOs) to the detriment of independent distributors and consumers.[763] EchoStar argues that the proposed transaction will give News Corp. an opportunity to engage in collusive practices, as it will make complementary the interests of News Corp. and the large vertically integrated cable operators and will allow mutually beneficial, but anticompetitive, deals between those companies. Further, it claims that such collusion presents only upside and no cost if News Corp. and a vertically integrated cable MSO enter into an agreement to raise the prices of the News Corp. programming carried by the cable MSO's systems and the cable MSO's programming carried by DirecTV, because the higher programming fees would cancel each other out for the two companies, while independent distributors and consumers would bear the burden of this anticompetitive behavior in the form of higher programming prices and subscription fees.[764] EchoStar argues that the criteria used by the DOJ and the FTC to determine the likelihood of lessened competition through coordinated interaction as a consequence of a horizontal merger are present in this transaction.[765] EchoStar argues that the relevant MVPD markets are concentrated and exhibit comparatively substantial barriers to entry.[766] In the average geographic region, EchoStar contends, the incumbent cable provider holds roughly 80% of the MVPD market, and DirecTV holds about 10%, resulting in a highly concentrated market (an HHI over 6000). Accordingly, EchoStar claims that collusion or coordination is likely.

277. EchoStar also argues that News Corp. has a history of collusive behavior with the largest cable MSOs.[767] Furthermore, EchoStar avers that the involvement of the same firms and same individuals substantially raises the risk of repeated collusion. EchoStar asserts that in 1996 and 1997, News Corp.'s announcement that it intended to enter the DBS business in the United States (by means of a merger with EchoStar) caused Primestar Partners (a cable MSO-DBS joint venture) to react and convince News Corp. to pull out of the deal with EchoStar in favor of a transaction with Primestar. According to EchoStar, the DOJ found that when it was clear that News Corp. would not compete with

762 **[REDACTED]**.

763 EchoStar Petition at 32.

764 *Id.* at 33.

765 *Id.* at 33 citing DOJ/FTC Guidelines § 2.1.

766 EchoStar Petition at 33-34.

767 *Id.* at 34-36.